PUBLIC BANK BHD

v.

HENG WENG CHIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-4332-1998]
3 DECEMBER 2001

CIVIL PROCEDURE: *Affidavits - Filing and service - Affidavit in reply - Non-compliance with 14-day time limit - Two-week delay - Whether substantial - Whether reasons for delay unacceptable - Rules of the High Court 1980, O. 3 r. 5, O. 18 r. 19(1)(b), O. 32 r. 13(2)(b), O. 92 r. 4*

This was an application by the third defendant against the decision of the learned registrar dismissing his application for extension of time to file and serve his affidavit in reply. The facts showed that third defendant was served with the plaintiff's affidavit on 23 March 2000 but had filed his affidavit in reply on 26 April 2000, thereby contravening O. 32 r. 13(2)(b) Rules of the High Court 1980 ('the Rules') which allowed only 14 days within which to file the same. The third defendant explained the delay by saying that it was the fault of the lawyer's clerk in not informing the counsel promptly of the receipt of the plaintiff's affidavit. The third defendant also submitted that he was in Penang till 25 April 2000 and could not be contacted as he had left his hand phone battery charger in Kuala Lumpur. The explanation was rejected by the learned Registrar and hence the appeal herein. The third defendant's appeal aside, the plaintiff had also appealed against the learned registrar's decision dismissing their application to strike out the third defendant's defence under O. 18 r. 19(1)(b) of the Rules and for judgment to be entered for them.

Held:

[1] Though the 14 days period stipulated in O. 32 r 13(2)(b) of the Rules is mandatory, the court still retains power to exercise its discretion under O. 3 r. 5 and its inherent powers under O. 92 r. 4 of the Rules upon eminently cogent and sound reasons. (p 753 h)

[2] The Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Pg) Registered v. Lee Boon Tin*, following *Birkett v. James*, adopted the principles that an inordinate and inexcusable delay which involves complete, total or wholesale disregard for the rules of the court with full awareness of the consequences is capable of amounting to such

an abuse that the action may be struck out or dismissed on that ground, and that, in such a case, there is no necessity to show prejudice. (p 755 e)

[2a] However, there may occur real situations faced by a litigant or his counsel which makes it impossible or highly difficult to comply with a particular court rule. Hence a robotic approach to court rules should be frowned upon. Consequently, the court would have to maintain a practical balance between the need to enforce credible sanctions for blatant contravention of court rules and regard to the abiding truism that the substantive merits of a case is where real justice resides. (p 756 c, d & e)

[2b] The solution to the problem perhaps lies in the court accepting the concept of prejudice to due administration of justice as a fresh ground for dismissal to the opposing litigant, if the extent and nature of the breach of court rule is contumelious or serious. (p 756 g)

[3] The delay here was substantial, over twice the 14 days period allowed. Indeed the third defendant was forewarned of the impending due service, when the unsealed copies of affidavit and summons in chambers were served on him on 4 February 2000. Further, the reason for the inordinate delay is unacceptable and its cogency and gravity is not equipollent or co-extensive with the inordinate length of delay. The registrar, hence, acted on correct principles in dismissing the third defendant's application for extension of time. (pp 757 h-i & 758 c, f-g)

[4] There was no *prima facie* merit in the third defendant's defence. The third defendant's claim that there was no privity of contract between him and the plaintiff bank was wholly untenable, as the claim is not grounded upon any privity of contract but upon monies had and received, and the third defendant had admitted receiving the amount. The third defendant's defence, indeed, contained nothing more than mere bare denials. (pp 758 i & 759 a-b)

[Defendant's appeal dismissed; plaintiff's appeal allowed.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney and Co v. Raja (TLR 29 December 1997) ***(refd)***

Birkett v. James [1978] AC 297 ***(refd)***

Cheah Teong Tat v. Ho Gee Seng & Ors [1974] 1 MLJ 31 ***(refd)***

Choraria v. Sethia (TLR 29 January 1998) ***(refd)***

Esso Malaysia Bhd v. Hills Agency (M) Sdn Bhd & Ors [1994] 1 MLJ 740

Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 MLJ 41 ***(refd)***

Grovit v. Doctor (The Times 25 April 1997) ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Ong Guan Teck & Ors v. Hijjas [1982] CLJ 31; [1982] CLJ (Rep) 616 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 3 MLJ 332 ***(refd)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 3 All ER 933 ***(foll)***
Suppuletchimi v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 ***(refd)***
Transcom Rand (M) Sdn Bhd v. Mara Holdings Sdn Bhd and Omar Johar (3rd party) (Suit No: D1-22-556-96) (unreported) ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Pg) Registered v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5, O. 18 r. 19(1)(b), O. 32 r. 13(2)(b), O. 92(4)

For the plaintiff/appellant - Azlan Sulaiman; M/s Allen & Gledhill
For the defendant/respondent - Mohd Aris Mustaffa (John Henry Louis); M/s Liow Teik Foong & Partners

Reported by WA Sharif

JUDGMENT

Vincent Ng J:
Before me:

(i) the third defendant appealed (*vide* encl. 28 – the first appeal) against the decision of the registrar dismissing his application for extension of the 14 days period (limited by O. 32 r. 13(2)(b) of the Rules of the High Court 1980 (the Rules)) within which he would have to file and serve his affidavit in reply to the plaintiff's affidavit in support of the application to strike out the defence; and

(ii) the plaintiff appealed (*vide* encl. 29 – the second appeal) against the registrar's dismissal of their application under O. 18 r 19(1)(b) for the whole defence to be struck out and judgment to be entered for the plaintiff.

Before I consider the merits of the first appeal, a brief discussion on the law would be in order. Though the 14 days period stipulated in the O. 32 r. 13(2)(b) of the Rules is mandatory, the court still retains powers to exercise its discretion under O. 3 r. 5 and its inherent powers under O. 92(4) of the Rules upon eminently cogent and sound reasons. Rule 13(2) provides as follows:

13.(2) Save as otherwise provided in these rules:

(a) an affidavit intended to be used in support an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

The essential function of a judge of law is to decide – not viscerally, but through rigorous legal analysis – where the substantive justice of the case lie in the contest of rights or for reliefs between the parties rather than to arbitrate on the strength of counsels' ingeniousness in raising technical or novel objections. I had occasion to express in my speech to Inns of Court barristers practising in Perak (see [2001] 2 MLJ 37) that in order to dispense equitable and just justice the court should be more concerned with the substantive merits rather than the nitty-gritty procedural or formal aspects of a case. Thus, objections in matters of form, time or procedure ought not be accepted by the courts to defeat or override the substantive merits of the case unless it can be brought within the ambit of either, prejudice caused to the opposite litigant or to the due administration of justice, which has been recently also brought within the concept of an abuse of court process. Due to the exigency of time in having to case-manage escalating number of cases, the scope and judicial concept of abuse of process has, in the Commonwealth Courts, acquired a less amorphous and more definite definition to encompass prejudice to the due and expeditious administration of civil justice. This fresh principle was laid down and established in two English cases, namely: *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Others, Chishty Coveney and Co v. Raja* (TLR 29 December 1997 at 698), and *Choraria v. Sethia* (TLR 29 January 1998 at 43). (See also *Grovit v. Doctor* The Times 25 April 1997; [1997] TLR 214; [1997] 1 WLR 640) and *Birkett v. James* [1978] AC 297.) In *Arbuthnot*, Lord Woolf, Master of the Rolls, had to say:

> Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice.
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> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

> The change in culture which was already taking place would enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules was an abuse of process.

Though the cases were decisions in 'satellite proceedings', particularly striking out applications, they all concern non-compliance of court rules in the context of prejudice to the due administration of justice whereby prejudice to the opposing party need not be shown. The new principles established in the two English cases found favour with and was recommended for adoption by our Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Pg) Registered v. Lee Boon Tin* [1998] 4 CLJ 368. This is how it was expressed by Mokhtar Sidin JCA who delivered the judgment of the court, at p. 384:

> From our observation, it is clear to us that from the two cases there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v. James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. **From the decisions too, it appears to us that there is no necessity to show prejudice in such cases.** As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put in many aspects of its operation to use.
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> There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. **As such, we see no reason why we should not adopt the principles stated in those two decisions.** (emphasis added)

In my view the new principles clearly established in satellite proceedings in England are applicable to cases such as the case at hand which also concern the non-observance of court rules, a *fortiori*, when such rules are

specially introduced in specific amendments for the designed purpose of countering stale or 'warehouse proceedings' or tardy or slothful parties. The other aspect of this issue which cannot escape a thinking mind is that, should the sole consideration for exercise of the court's discretion be whether the breach of court rules has occasioned prejudice to the opposing litigant – in complete disregard to prejudice to the due administration of justice – then we might as well do away with court rules, since, with such approach court rules become dead letter as soon as they are legislated into being. Yet, nevertheless, one cannot but be enamoured with – nay, treasure – the saving grace of the court's discretionary powers bearing in mind the uncertainties of life consequential upon the way mortals arrange, or have their affairs arranged for them or have it unfortunately thrust upon them, there may occur real situations faced by a litigant or his counsel which makes it impossible or highly difficult to comply with a particular court rule; hence, a robotic approach to court rules should be frowned upon by the courts. Now, with the palpable reversion to the era of true and tangible fairness in the administration of justice I am sure that henceforth our courts at all levels would have to wrestle with the perennial problem of maintaining a feasible and practical balance between the need to enforce credible sanctions for blatant and flagrant contravention of Court Rules (as would be prevalent if such conduct is readily passed over by the courts) and conscious regard to the abiding truism that the substantive merits of a case is where real justice resides.

In my view the solution to this intractable problem could perhaps be found in the new approach taken by the English courts in the two Court of Appeal decisions in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Others*, *Chishty Coveney and Co v. Raja* (TLR 29 December 1997 at 698) and *Choraria v. Sethia* (TLR 29 January 1998 at 43) which advocated the adoption of the novel concept of prejudice to the due administration of justice as a fresh ground for dismissal or striking out of an action or defence, should there be no prejudice to the opposing litigant, if the extent or nature of the breach of court rules is contumelious or serious. (Refer to my judgment in Guaman No. D1-22-556-96, *Transcom Rand (M) Sdn Bhd v. Mara Holdings Sdn Bhd and Omar bin Johar (3rd Party)* for further discussions on this topic.)

This new concept clearly stem from the obvious truism that since the court's time is limited and finite, parties who hog or monopolise judicial time through contumelious or contumacious or vexatious or slothful or tardy conduct deprive other litigants from their fair share of the court's time. Further, with the escalating backlog of cases there must be a determined effort on the part of judges to see the end of litigation as a tactical weapon

– truly, a common phenomenon in the commercial courts. It was clearly with the sole intention of ensuring the due and expeditious administration of justice that O. 32 r. 13(2) of the Rules was introduced by the Rules Committee – surely, it cannot be an exercise in vain. Thus, in order to override considerations of prejudice to the due and expeditious administration of justice, the court in the exercise of its discretion to extend time has essentially to consider whether the cogency and gravity of the applicant's reasons for the delay is co-extensive with the length of the delay for which the extension is sought, even if such delay has caused no prejudice to the other party. It is now settled that the rules of court must *prima facie* be obeyed, with adverse consequences if not obeyed. This principle was clearly and authoritatively laid down in a clear language by the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 3 All ER 933 by Lord Guest in the following terms (at p. 935):

> The rules of court must, *prima facie,* be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant.

The above principles in *Ratnam* were consistently followed in our courts – in *Ong Guan Teck & Ors v. Hijjas* [1982] CLJ 31; [1982] CLJ (Rep) 616, *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399, *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 MLJ 41 and *Cheah Teong Tat v. Ho Gee Seng & Ors* [1974] 1 MLJ 31.

Let us now examine the merits of the third defendant's appeal. Firstly, was there inordinate or substantial delay in compliance with O. 32 r. 13(2)(b) of the Rules? I would hold that the delay was inordinate and substantial as the third defendant filed his affidavit in reply (encl. 24) only on 26 April 2000 despite having received the plaintiff's sealed copies of encls. 22 (affidavit) and 23 (summons-in-chambers) on 23 March 2000 – which is over twice the 14 days period allowed. Indeed, he was forewarned and was very much aware of the impending due service of encls. 22 and 23 as the unsealed copies of same were also served on him on 4 February 2000 – which is about six times the 14 days period allowed – and he could have

poised himself to promptly respond upon due service. Secondly, was there material evidence before the court for consideration in deciding whether to exercise its discretion? The material evidence for the court's consideration appears in paras. 7 and 8 of encl. 25, in which he deposed that the lawyer's clerk did not inform the counsel in charge of the receipt of encls. 22 and 23 until 13 April 2000 (in para. 7) and thereafter he had to go to Penang until 25 April 2000 and he cannot be reached because his handphone battery charger was left in Kuala Lumpur (in para. 8). The third question to determine is whether the reasons for the inordinate delay is acceptable to this court and its cogency and gravity is equipollent or co-extensive with the inordinate length of delay. Here, I found that the third defendant failed on both counts. The reasons being that: any shortcoming in the manner a counsel's office is run cannot constitute a ground acceptable to the court for an exercise of a discretion; there were substantial number of days in which he could have contacted his counsel from Penang through other phones (fixed line or wireless) if his handphone was in fact non-functioning; he could have purchased or borrowed a battery charger to ensure that others could contact him if it was true that he forgot to carry along his charger; as a handphone and its battery charger is so closely coupled it is highly incredible that he could have embarked upon an outstation trip for that substantial number of days with his handphone but without its battery charger – surely, empirical evidence does not support the probability of such conduct; and most crucially, as he was aware of the existence of encls. 22 and 23 before his Penang trip as early as 4 February 2000 following service of the unsealed copy, clearly he had his priorities wrong in neglecting to contact his counsel during the urgent currency of his case.

For all the above reasons, I am entirely satisfied that the registrar acted on correct principles as applied to the adverse facts of the case in dismissing the third defendant's application for extension of time to file his affidavit in reply (encl. 24) and his appeal before me is dismissed with costs.

I shall now turn to consider the plaintiff's appeal in encl. 29.

On the second appeal, the court would now have to consider whether any useful purpose would be served in allowing the third defendant his day in court, which the court should allow if there is *prima facie* an element of defence in his pleaded case. Even had the extension of time to file the affidavit been allowed by the registrar, yet after having carefully studied the pleadings and the affidavits filed by both sides, I found no *prima facie* merit in the third defendant's defence. The reasons are as follows. It was

the third defendant's contention that there was no privity of contract between the plaintiff and him as he was not a customer of the plaintiff bank whereas the 1st and 2nd defendants were such customers. This contention is wholly untenable as the claim is not grounded upon any privity of contract but upon monies had and received, and the third defendant had admitted receiving the amount claimed though he said that he "was not responsible to the plaintiff on the amount" – in paras. 6 and 10 of the defence. It is also noted that paras. 1, 2, 4, 5, 7, 8, 9, 11 and 12 contained mere bare denials, such as, 'I do not have knowledge' or 'I deny', without stating what the money received was for or otherwise condescend to any other particulars which may help the court to conclude that he has a *prima facie* defence. (See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, *Esso Malaysia Bhd v. Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740, and *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332.) Surely, on the defence as pleaded by the third defendant no purpose would be served by ordering it to go for trial save to waste the court's crowded time. I would take this opportunity to restate what I had said in *Suppuletchimi v. Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 at p. 369:

> (2) The court recognises that in summary proceedings, a trial on affidavits would be clearly wrong. But, it is still incumbent upon the court to determine whether issues could more appropriately be decided without the expense of a full trial. *Prima facie* evidence which is capable of being adduced by affidavit evidence ought to be so adduced even in summary proceedings. The crucial question the court would have to ask itself is: (i) whether the evidence essential to make out a reasonable *prima facie* cause of action or triable issue of fact are of the nature such that they are adduceable by affidavit evidence, and if so; (ii) whether such *prima facie* evidence had been adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must contain particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable *prima facie* cause of action or a triable issue or issues of fact or law in the defence.
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> (3) The mere assertion in an affidavit does not *ipso facto* provide immunity against the claim or defence from being struck out under r. 19(a), (b) or (c) (or leave to defend refused in an O. 14 matter). The court must look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a *bona fide* or *prima facie* cause of action, and the defendants (in an application to strike off the defence) have not only raised an issue but also that the issue is, *prima facie*, triable. The defendants have to make out a good *prima facie* defence only if the plaintiff's case is also *prima facie* a good case.

Consequently, having considered the defence as pleaded and all affidavits filed by both sides I have no alternative but to allow the plaintiff's appeal with costs and grant leave to sign final judgment against the third defendant.